Petition

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81-692

No.

In the

Supreme Court of the United States

October Term, 1981

JOSHUA STONECIPHER,

Petitioner,

vs.

WILLIAM E. BRAY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Filed October 9, 1981

QUESTIONS PRESENTED

1. Does enforcement by the federal courts of a Treasury Regulation which is patently contrary to federal statute violate the doctrine of separation of powers?

2. Can a citizen set forth a Fifth Amendment due process "cause of action" against the I.R.S. and its officers under Davis v. Passman, 442 U.S. 228 (1979), where conduct of the defendants is manifestly against federal statute?

3. Is the Anti-Injunction Act, 26 U.S.C. § 7421 a bar to an injunction against the I.R.S. where the agency's actions are manifestly contrary to federal law?

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming on August 10, 1981, the dismissal of a civil action for lack of subject matter jurisdiction and failure to state a claim.

OPINION BELOW

Petitioner's civil action brought against the Internal Revenue Service (I.R.S.), I.R.S. officers, and petitioner's employer was dismissed for lack of subject matter jurisdiction and failure to state a claim. On a direct appeal to the U.S. Court of Appeals for the Ninth Circuit, the district court's action was affirmed in an Opinion published at 653 F.2d 398 (1981). (Appendix B) The Court of Appeals rendered its decision on August 10, 1981, and petitioner chose not to file a Motion for Rehearing, nor did petitioner file a Motion for Rehearing En Banc.

JURISDICTION

The Judgment of the Court of Appeals was entered on August 10, 1981, and this petition is timely filed within sixty days after the Court of Appeals Judgment of said date. Jurisdiction of this Court is invoked under

Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does enforcement by the federal courts of a Treasury Regulation which is patently contrary to federal statute violate the doctrine of separation of powers?

2. Can a citizen set forth a Fifth Amendment due process "cause of action" against the I.R.S. and its officers under Davis v. Passman, 442 U.S. 228 (1979), where conduct of the defendants is manifestly against federal statute?

3. Is the Anti-Injunction Act, 26 U.S.C. § 7421 a bar to an injunction against the I.R.S. where the agency's actions are manifestly contrary to federal law?

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fifth Amendment to the U.S. Consti-

tution of the United States:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

2. Separation of Powers. (No express provision contained within the U.S. Constitution.)

STATEMENT OF THE CASE

Petitioner filed an action against the I.R.S. and some of its officers, and against his employer for violation of constitutional rights, violation of the Civil Rights Acts of 1870 and 1871, under provisions of the Internal Revenue Code, and in contract and in tort. Gravamen of petitioner's action was that he had filed with his employer a valid Form W-4 exempt pursuant to 26 U.S.C. § 3401, and that contrary to the express language of § 3402(n) his employer, under orders of the I.R.S., withheld from petitioner's paycheck.

Petitioner's filing was not made in protest, but in good faith belief that he was entitled to exempt under the law, for reason he in fact incurred no tax liability the previous year (due to business losses), and reasonably anticipated the same for the current year.

This petition draws into question whether or not petitioner set forth a "cause of action" under the Fifth Amendment due process clause in light of Davis v. Passman; and this petition raises separation of powers issue arising from the Ninth Circuit's enforcement of an I.R.S. regulation which is contrary to express law.

On direct appeal from the trial court to the U.S. Court of Appeals for the Ninth Circuit, the appellate court found that the case was properly dismissed as to the I.R.S. because: (1) injunctive relief was barred under the Anti-Injunction Act,

26 U.S.C. § 7421; (2) that the Civil Rights Acts, 42 U.S.C. § 1981, 1983, 1985 and 1986 are intended to protect citizens against racial discrimination, a fact not alleged by this petitioner, and (3) that petitioner failed to state a claim under Bivens v. Six Unknown Federal Narcotics Agents, 43 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Likewise, the appellate court dismissed the actions as to the employer on similar grounds, together with petitioner's failure to state a claim in contract due to his failure to allege that "his employment contract contained a provision requiring Bechtel to refrain from withholding taxes from his paycheck." 653 F.2d 403. Petitioner had relied upon an implied contract theory.

Notwithstanding petitioner's arguments in his opening and reply briefs, together with his oral argument before the appellate court, that the mainstay of his action was

the fact that defendant's action was "plainly without legal basis" and that it involved conduct "manifestly or otherwise beyond the authority of the I.R.S. officers, conduct in which Bechtel defendants participated," a theory followed by this court in Butz v. Economu, 438 U.S. 478, 489 (1978), the appellate court completely ignored this Fifth Amendment due process violation. Instead, the court discussed, at 403, only the due process argument with regard to failure of the I.R.S. to grant petitioner a hearing before determining that petitioner was not entitled to claim exemption from federal income tax. The Court of Appeals did not reach the question of immunity of federal officers.

Likewise, the court failed to address petitioner's argument that this, unlike all of the other Anti-Injunction Act reported cases is a case in which the I.R.S. has

violated the law, and for that reason the Anti-Injunction Act does not apply.

Finally, the court's opinion raises for this court the question of separation of powers. Beginning at page 401 of the Opinion, the court, in discussing whether or not the I.R.S. had the statutory authority to change a Form W-4 filed by an employee with his employer, relied, not upon statutory law as passed by Congress, but upon Treasury Regulations. Rather than construing the statutory scheme in light of its purpose, the court, at 403, construed the "regulatory scheme in light of its purpose." And the court, at 403, found within a regulation rather than a law passed by Congress, an "implicit grant of authority to the I.R.S. to review withholding certificates for compliance with the Internal Revenue laws and to declare invalid those certificates found not to be

in compliance." A reading and interpretation by the appellate court of regulations as if they were law passed by Congress, and finding that those regulations control despite express statutory language to the contrary, raises, under the doctrine of separation of powers, the question: Are the courts to enforce I.R.S. regulations which are clearly in conflict with law passed by Congress?

REASONS FOR GRANTING THE WRIT

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1. Enforcement by the federal courts of Treasury Regulations and I.R.S. procedure which is opposite to 26 U.S.C. § 3401(n) violates the constitutional doctrine of separation of powers.

2. Petitioner stated a Fifth Amendment due process "cause of action" against I.R.S. and employer defendants.

3. The Anti-Injunction Act, 26 U.S.C. § 7421 does not apply where conduct of the I.R.S. is manifestly beyond the authority granted by Congress.

I.

ENFORCEMENT BY THE FEDERAL COURTS OF TREASURY REGULATIONS AND I.R.S. PROCEDURE WHICH IS OPPOSITE TO 26 U.S.C. § 3401(n) VIOLATES THE CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS.

The law provides that an employer shall withhold taxes from the employees wages according to the Form W-4 filed by the employee, except where the Form W-4 is "invalid." See 26 U.S.C. § 3402(a) and Treasury Regulations § 31.3402(f)(2)-1(e), which defines "invalid" Form W-4 as one with any alteration or unauthorized addition or a form which the employee has clearly indicated to be false by oral or written statement made on or before the date the form is filed with the employer. And, see

Treasury Regulation § 31.3401(e)-1(b), which provides that it is not the duty of the employer to ascertain whether or not a Form W-4 is correct.

The mainstay of petitioner's complaint in this action is that he has been denied due process of law under law passed by Congress, 26 U.S.C. § 3402(n), which provides:

> Notwithstanding any other provision of this section, an employer shall not be required to deduct and withhold any tax under this chapter upon payment of wages to an employee if there is in effect with respect to such payment a [form W-4 exempt] furnished to the employer by the employee . . . ." (Emphasis added.)

Notwithstanding the mandatory language of 3402(n), together with the fact that petitioner filed with his employer a valid Form W-4 exempt, petitioner's employer, under direction of the I.R.S. disregarded defendant's Form W-4 exempt and withheld monies from defendant's paycheck. In its Opinion,

the Court of Appeals did not even give recognition to 3402(n) and the mandatory language contained therein. Instead, the court chose to regard regulations as statute, and applied rules of statutory construction to the regulations. Rather than turn to the statute and discover implicit power, if any, within said statute, the court found within the regulations an implicit power granted to the I.R.S. to order an employer to disregard a Form W-4 exempt filed by the employee.

The problem with this logic is two-fold: regulations are interpretations of the law and cannot be contrary to law; and (2) implicit power, if there is any to be found, must be found within the statute, not the regulation. To allow otherwise, allows a federal agency to write and enforce a regulation manifestly contrary to law passed by Congress and have the courts enforce same.

Such an approach obviously violates the doctrine of separation of powers for it allows an executive branch to encroach upon the duties of Congress.

This court has held that the doctrine of separation of powers protects the liberties of the people from excessive concentration of power within one branch of government. United Public Workers v. Mitchell, 330 U.S. 75 (1947); O'Donogue v. United States, 389 U.S. 516 (1933). And long ago, this court remarked that our system of separation of powers requires clear lines separating the branches of government. Kilbourne v. Thompson, 103 U.S. 168 (1881). See also National Mutual Insurance Company vs. Tidewater Transfer Company, 337 U.S. 582 (1949); Marshall v. Gorden, 243 U.S. 521 (1917) (contempt powers of Congress); Sinking Fund Cases, 99 U.S. 700 (1879).

Finally, petitioner's position is not

weakened by the fact that, subsequent to the action complained of herein, I.R.S. did, in fact, promulgate new regulations which allegedly grant I.R.S. the power to require an employer to disregard a Form W-4 exempt filed by an employee. See Treasury Regulations § 31.3402(f)(2)-1(g), effective April 1, 1980.

Existence of a new regulation, in fact, bolsters petitioner's petition for reason that it shows that at the time of the acts complained of herein, I.R.S. was without even regulatory authority to carry out its enforcement action. It was for that reason the Court of Appeals, at 403, found implicit authority within the regulations existing at the time of the complained action.

II.

PETITIONER STATED A FIFTH AMENDMENT DUE PROCESS "CAUSE OF ACTION" AGAINST I.R.S. AND EMPLOYER DEFENDANTS.

The appellate court disregarded peti-

tioner's argument made under the Fifth Amendment due process clause and the constitutional tort theories enumerated in Bivens v. Six Unknown Federal Narcotic Agents, 403 U.S. 388 (1971) and 456 F.2d 1339 (2nd Cir. 1972); Scherrer v. Rhoades, 416 U.S. 232 (1974); Butz v. Economu, 438 U.S. 478 (1974); Mark v. Groff, 521 F.2d 1376 (9th Cir. 1975) (action against I.R.S. agents). Petitioner's major theory - that the conduct of I.R.S. defendants was "manifestly beyond their authority" - is best articulated in Butz.

An official will "not be excused from liability if he failed to observe obvious statutory or constitutional limitations of his powers or if his conduct was a manifestly erroneous application of the statute." 438 U.S. 494. The Butz court relied upon two earlier abuse of power decisions: Little v. Barreme, 2 Cranch 170 (1804) and

Bates v. Clark, 95 U.S. 204 (1977).

In Little, the President of the United States acted beyond his authority in authorizing seizure of suspected vessels going "to or from" French ports, where Congress had directed the President to intercept vessels going "to" a French port. The Commander of an American warship was held liable in damages for seizure of a ship enroute "from" a French port, an act beyond the express statutory authority. An officer was likewise held answerable in damages for seizure of property in Bates, where seizure of alcoholic beverages was made "outside" of Indian country. The relevant statute allowed for seizure "in" Indian country.

Similarly, in the instant case, I.R.S. officers have caused a seizure or confiscation of petitioner's wages in a manner obviously contrary to statutory and constitu-

tional limitations on their powers, a seizure in which petitioner's employer has participated. "No man in this country is so high that he is above the law." United States v. Lee, 106 U.S. at 220, quoted in Butz, 438 U.S. at 506.

In the case at bar, the appellate court and the defendant's relied upon the "due process" tax cases in support of their theory that petitioner has failed to state a claim. Yet, all of those cases concern actions of officers pursuant to statute or regulation. For example, in the leading case of Phillips v. Commissioner, 283 U.S. 589 (1931), I.R.S. acted pursuant to a statutory section providing for summary administrative proceedings, and in G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977), I.R.S. made jeopardy assessment pursuant to 26 U.S.C. § 6861(a).

That ours is an income tax system of

"self-assessment and voluntary compliance" is undisputed. Congress has designed such a scheme of tax collection in which the obligation is placed upon the employee to instruct his employer as to the amount of monies to be withheld from wages. The employer has a reciprocal obligation to honor the withholding statement filed by the employee. While the Commissioner may, under 26 U.S.C. § 7802 have "such duties and powers as may be prescribed by the Secretary of the Treasury," he is without authority to change the design of Congress.

In the recent case of Davis v. Passman, 442 U.S. 228 (1979), this court held that petitioner Davis had stated a Fifth Amendment due process cause of action against her Congressman employer, the single issue on appeal. Petitioner urges that the I.R.S. and its officers should be no more immune from obeying the law than a

member of Congress.

III.

THE ANTI-INJUNCTION ACT, 26 U.S.C. § 7421 DOES NOT APPLY WHERE CONDUCT OF THE I.R.S. IS MANIFESTLY BEYOND THE AUTHORITY GRANTED BY CONGRESS.

The Anti-Injunction Act, 26 U.S.C. § 7421 is not applicable in the instant case for reason that defnedants have not acted pursuant to Code, Rule or Regulation. While petitioner is quite mindful of the heavy burden he faces regarding the congressional prohibition of pre-enforcement tax suits, which prohibition was enacted in 1867, he urges that the case at bar presents an issue never before addressed by this court: whether or not the Anti-Injunction Act applies where the actions of the I.R.S. are "plainly without a legal basis." Petitioner's case is distinguished from those cases such as Bob Jones University v. Simon, 416 U.S. 725, 745 (1974), for the reason that in all of the reported cases involving the Anti-

Injunction Act, the I.R.S. acted pursuant to a statute or commissioner's rule or regulation. Petitioner urges that if there are no bounds to the I.R.S.'s power, there is no purpose to be served by the Judiciary.

For example, to follow the logic of the appellate court and defendants herein would allow the I.R.S., with the assistance of an employer, to levy upon and seize the entire paycheck of an employee without first acting pursuant to I.R.S. collection processes authorized by Congress. Defendants would then argue that petitioner's remedy is by way of a refund suit, despite complete deprivation of petitioner's livelihood.

Obviously, Congress intended to protect the public treasury by way of the Anti-Injunction Act in cases where the I.R.S. and employers act pursuant to some method authorized by Congress or its delegates.

But the Constitution gives no preference to tax laws as to permit them to override the freedoms guaranteed by the Constitution, and this issue is obviously linked to the previous argument regarding due process of law as guaranteed by the Fifth Amendment. The Anti-Injunction Act is no barrier where the I.R.S. has acted not only without legal basis, but opposite to law enacted by Congress. Compare: United States v. American Friends Service Committee, 419 U.S. 7 (1974) (religious protest).

CONCLUSION

For the reasons urged herein, it is respectfully requested that a Writ of Certiorari issue to review and reverse the Judgment entered herein by the U.S. Court of Appeals for the Ninth Circuit.

DATED this 8th day of October, 1981.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 80-5037

JOSHUA STONECIPHER,	*	
	*	Appeal from the
Appellant,	*	United States
	*	District Court
vs.	*	
	*	DC CV 79-737 WEC
WILLIAM E. BRAY, et al.,	*	
	*	
Appellees.	*	

Submitted: March 12, 1981

Filed: August 10, 1981

Before TANG and POOLE, Circuit Judges and LUCAS,* District Judge.

TANG, Circuit Judge:

Stonecipher filed an action against his employer, Bechtel Corporation, and the Internal Revenue Service (IRS), seeking: (1) an injunction prohibiting Bechtel from denying him exemption from federal

income tax withholding; (2) a writ of mandamus directing the IRS to order payment of withheld taxes; (3) a writ of mandamus directing the IRS to hold a hearing before denying his claim for exempt status; and (4) punitive damages. The district court dismissed for lack of subject matter jurisdiction and failure to state a claim. We affirm.

In January 1979, Stonecipher submitted to Bechtel a Form W-4 withholding certificate claiming exemption from federal income tax. Bechtel, unable to verify the correctness of the certificate, forwarded it to the IRS pursuant to Treasury Regulation § 31.3402(n)-1 (1979).

On February 27, 1979, the IRS requested Stonecipher to contact them so that they could determine whether he was entitled to claim exemption from withholding. Enclosed with the letter was a worksheet to enable Stone-

cipher to calculate his withhodling allowances. The letter informed Stonecipher that if he did not respond within two weeks, the IRS would advise Bechtel to withhold from his wages as if he were a single person claiming no additional exemptions.

When Stonecipher failed to substantiate the information contained in his W-4, the IRS informed him that it had determined that his W-4 was incorrect; that he was not entitled tc claim exemption from withholding; and that it had advised Bechtel to disregard his W-4 and to withhold as if he were a single person with no exemptions. Pursuant to the IRS's instructions, Bechtel withheld taxes from Stonecipher's wages.

In August 1979, Stonecipher filed his complaint against Behctel, the IRS, and their respective agents.[1] The district court dismissed the action for lack of subject matter jurisdiction and failure to state a claim

under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Stonecipher appeals.

I

Dismissal Against IRS

A. Injunctive Relief

Stonecipher's complaint sought to enjoin the IRS from denying him exempt status and to require the IRS to repay withheld taxes. Stonecipher alleged that the IRS had no authority to review his W04 or to direct Bechtel to withhold taxes and that these actions violated his rights under 42 U.S.C. §§ 1981, 1983, 1985, and 1986. Stonecipher further alleged that even if the IRS's actions were authorized by law, due process required the IRS to hold a hearing to determine whether he qualified for exempt status before instructing Bechtel to withhold.

[1,2] Under I.R.C. § 7421(a), the district court properly dismissed for lack of subject-matter jurisdiction Stonecipher's prayer for injunctive relief. Section 7421(a) provides in pertinent part:

> collection of any tax shall be maintained in any court by any person . . . .

Section 7421(a), also known as the "Anti-Injunction Act," has been upheld by the United States Supreme Court and is strictly enforced. See, e.g., Bob Jones University v. Simon, 416 U.S. 725, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974); Alexander v. Americans United, Inc., 416 U.S. 752, 94 S.Ct. 2053, 40 L.Ed.2d 518 (1974). The only exception to the Anti-Injunction Act is where the taxpayer demonstrates that: (1) under no circumstance can the governmental defendant ultimately prevail; and (2) the taxpayer will be irreparably harmed if the injunction is not granted. Enochs v. William Packing & Navigation Co., 370 U.S. 1, 7, 82 S.Ct. 1125, 1129, 8 L.Ed.2d 292 (1962).

[3] With respect to the first prong of the Anti-Injunction Act exception, Stonecipher argues that the IRS could not have ultimately prevailed on his civil rights

claims or his due process claim. As discussed below, see sections I.B.-I.C., infra, we disagree. Moreover, because Stonecipher can sue for a tax refund under I.R.C. § 7422, he has failed to satisfy the exception's second prong, requiring a showing of irreparable harm if injunctive relief is denied.

B. Damage Relief under 42 U.S.C. §§ 1981, 1983, 1985, and 1986

[4,5] The district court properly dismissed Stonecipher's complaint alleging violations of 42 U.S.C. §§ 1981, 1985, and 1986 for failure to state a claim. Sections 1981, 1985, and 1986 address equal rights under the law and are intended to protect citizens against racial discrimination. Nowhere in his complaint did Stonecipher allege that he was the victim of racial or other class-based invidiously discriminatory action. The district court also properly dismissed Stonecipher's sec-

tion 1983 action. Section 1983 allows a party to bring a civil action for constitutional deprivations against person acting under color of state law. Stonecipher has no cause of action against the IRS under section 1983 because the IRS is a federal agency and its agents performed no acts under color of state law.

C. Damage Relief under Bivens

Stonecipher also argues that the IRS and its agents, acting under color of federal law, denied him due process by not holding a hearing prior to ordering Bechtel to withhold taxes. See Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Stonecipher's Bivens-styled claim encompasses two separate arguments. First, he contends that prior to April 1, 1980, the IRS did not have the statutory authority to review a W-4 that had been referred to it by an employer

and to direct the employer to withhold taxes from the employee's wages in accordance with its review determination. Second, he argues that even if the IRS was empowered with such authority, due process required it to hold a hearing prior to the collection of the taxes so that he could challenge the propriety of the IRS's decision.

Treasury Regulation § 31.3402(f)(2)-1 (1979) requires an employee to file a W-4 with the employer upon commencement of employment. Stonecipher filed a W-4 under Treasury Regulation § 31.3402(n) (1979) which allows an employee to claim exemption from withholding if: (1) the employee incurred no income tax liability in the preceding year; and (2) the employee anticipates no income tax liability for the current year. Bechtel was not required, however, to ascertain whether Stonecipher was entitled

to claim exemption from withholding but rather was obligated under Treasury Regulation § 31.3402(n)-1 (1979) to contact the District Director of the IRS if it believed that the W-4 contained an incorrect statement.[2]

Prior to April 1, 1980, Treasury Regulation § 31.3402(f)(2)-1 (1979) authorized an employer who had received an invalid certificate to withhold from an employee's wages as if the employee were a single individual claiming no exemptions. The regulation was silent, however, as to what procedures the District Directors were to follow upon being notified that a particular W-4 was believed to be inaccurrate. The procedures established by the IRS and followed here consisted of notifying the employee that the W-4 in question contained an incorrect statement; and instructing the employer to regard the W-4 as

an invalid certificate if the employee failed to submit sufficient information to determine the certificate's correctness. On April 1, 1980, these procedures were codified by amending Treasury Regulation § 31.3402(f)(2)-1, T.D. 7682, to include paragraph (g).[3]

[6] In determining whether the IRS was authorized before the amendment to review Stonecipher's W-4, we must construe the regulatory scheme in light of its purpose and interpret its particular parts so as not to render other parts meaningless. See United States v. Snider, 502 F.2d 645 (4th Cir. 1974). With this principle of statutory construction in mind, we interpret the language of Treasury Regulation § 31.3402(n)-1 (1979), which relieves the employer of the burden of determining the correctness of a W-4 and requires the employer to refer a questionable W-4 to the District

Director, as an implicit grant of authority to the IRS to review withholding certificates for compliance with the internal revenue laws and to declare invalid those certificates found not to be in compliance. To hold that the IRS did not have such a power of review would render Treasury Regulation § 31.3402(n)-1 (1979) meaningless.[4]

[7] Stonecipher's argument that due process required the IRS to grant him a hearing before determining that he was not entitled to claim exemption from federal income tax is foreclosed by well-settled law. The prompt collection of taxes is necessary for the nation's continued existence and is an important governmental interest that justifies postponing notice and an opportunity for a hearing. See Phillips v. Commissioner, 283 U.S. 589, 595-97, 51 S.Ct. 608, 610-12, 75 L.Ed. 1289 (1931). Stonecipher's due process

rights are adequately protected by the statutory scheme which allows him to contest his tax liability in the Tax Court prior to paying the disputed tax or to sue for a refund in federal district court or in the Court of Claims. See id.

II.

Dismissal Against Bechtel

[8] Stonecipher's complaint against Bechtel alleged the same constitutional and statutory violations as it did against the IRS. With respect to the actions arising under 42 U.S.C. §§ 1981, 1985, and 1986, the district court properly dismissed the complaint for the same reasons we held that Stonecipher's complaint failed to state a claim against the IRS. Even assuming that Bechtel acted under color of state law in withholding state taxes from Stonecipher's wages, his complaint failed to state a claim under 42 U.S.C.

§ 1982 because Bechtel's actions in withholding taxes prior to a hearing did not depirve him of any constitutional right.

[9] Stonecipher's complaint further alleged that Bechtel breached his employment contract by withholding taxes from his wages. This argument is without merit. Stonecipher has not alleged that his employment contract contained a provision requiring Bechtel to refrain from withholding taxes from his paycheck. In the absence of any express provision to the contrary, we conclude that when an employer withholds taxes from an employee's wages and pays the employee the balance, the employer has been discharged his contractual obligations. See United States Fidelity & Guaranty Co. v. United States, 201 F.2d 118, 120 (10th Cir. 1952). Indeed, a contractual clause providing otherwise might very well be invalid as

contrary to public policy.

III.

Costs

Based upon the record in this case and the arguments presented, we are convinced that this appeal is frivolous. Pursuant to 28 U.S.C. § 1912 and Federal Rule of Appellate Procedure 38, we award costs to Bechtel and the IRS.

AFFIRMED.

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*Honorable Malcolm M. Lucas, United States District Judge for the Central District of California, sitting by designation.

[1]The complaint also joined the defendants' spouses. No allegations, however, were made against the spouses in the complaint and there was no reference to them in Stonecipher's brief on appeal.

[2]As of April 1, 1979, Stonecipher and approximately 1,000 tax-protestor/employees had filed W-4 forms claiming exemption from withholding. This barrage of unusual filings justified Bechtel in questioning the veracity of Stonecipher's W-4.

[3]The new paragraph provides in pertinent part:

(g) Submission of certain withholding certificates - (1) General rule. An employer shall submit, in accordance with paragraph (g)(3) of this section, a copy of any withholding execmption certificate which is received from the employee during the reporting period (without regard to the date it is effective) if the employee is employed by that employer on the last day of the reporting period and if -

(ii) The certificate indicates that the employee claims a status exempting the employee from withholding, and the exception provided by paragraph (g)(2) of this section does not apply.

(2) Exception. A copy of the certificate shall not be submitted under paragraph (g)(1)(ii) of this section if the employer reasonably expects at the time the certificate is received that the employee's wages (under chapter 24 of the Code) from that employer shall not then usually exceed $200 per week.
(5) Computation of withholding. Until receipt of written notice from the Internal Revenue Service that a certificate, a copy of which was submitted under this section, is defective, that certificate is effective and the employer shall withhold on the basis of the statements made in that certificate. If the Internal Revenue Service finds that a copy of a withholding exemption certificate submitted contains any materially incorrect statement or if, after

written request to the employee for verification of the statements on the certificate, the Internal Revenue Service finds that a copy of a withholding exemption certificate submitted contains any materially incorrect statement or if, after written requests to the employee for verification of the statements on the certificate, the Internal Revenue Service determines that it lacks sufficient information to determine if the certificate is correct, and in either event so notifies the employer in writing, the employer shall then consider the certificate to be defective for purposes of computing amounts of withholding. The employer shall promptly furnish the employee who filed the defective certificate, if still in his employ, with a copy of the written notice of the Internal Revenue Service with respect to the certificate and may request another withholding exemption certificate from the employee. The employer shall withhold amounts from the employee as if the employee were a single person claiming no exemptions (see §31.3402(f)(2)-1(a)) until a new certificate is filed. If and when the employee does file a new certificate the employer shall withhold on the basis of that new certificate as currently effective, but must submit a copy of that new certificate if required by, and in accordance with, this paragraph (g).

[4] In Campbell v. Amax Coal Co., 610 F.2d 701 (10th Cir. 1979), a case almost identical

to the present one, it was also held that prior to the April 1, 1980 amendment, the District Director had the authority to declare withholding certificates invalid and to instruct employers to withhold accordingly. See also Rapp v. Peper, 45 A.F.T.R.2d 91, 80-374 (D. Alaska 1979).

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA STONECIPHER, Plaintiff-Appellant,	)	NO. 80-5037
vs.	)	DC CV 79-737 WEC
WILLIAM E. BRAY, et al., Defendants-Appellees.	)	

APPEAL from the United States District Court for the District of ARIZONA (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of ARIZONA (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is

affirmed.

Filed and entered: August 10, 1981

CERTIFICATE OF SERVICE

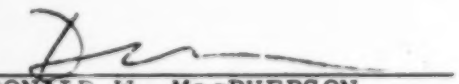
I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari by depositing the same in the United States Mail, Phoenix, Arizona, with sufficient airmail postage prepaid affixed thereto, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and one copy to:

Philip R. Placier
Thelin, Marrin, Johnson & Bridges
Two Embarcadero Center
San Francisco, California 94111

this 8th day of October, 1981.



DONALD W. MacPHERSON
3900 East Camelback Road
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(602) 957-9501
Attorney for Petitioner
JOSHUA STONECIPHER

Appendix

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

NO. 81-692

In the

Supreme Court of the United States

October Term, 1981

JOSHUA STONECIPHER, etc.,

Petitioner,

vs.

WILLIAM E. BRAY, et al.,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Attorney for Petitioner

Filed: October 29, 1981

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C. Judgment from United States District Court for the District of Arizona dated December 10, 1979. App. 20*

* Page numbers continued from Appendix contained in Petition for Writ of Certiorari Filed October 9, 1981.

APPENDIX C

JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF ARIZONA

JOSHUA STONECIPHER,	)	Civil Action File
	)	No. 79-737 PHX WEC
vs.	)	
	)	
WILLIAM E. BRAY, et al.,	)	
	)	

This action came on for hearing before the Court, Honorable Walter E. Craig, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiffs take nothing and that the complaint and action are dismissed.

. . .

Dated at Phoenix, Arizona, this 10th day of December, 1979.

W. J. Furstenau
Clerk of Court

By: Dorothy Ewart,
Deputy Clerk

CERTIFICATE OF SERVICE

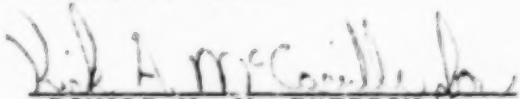
I hereby certify that I have served three copies of the foregoing Supplemental Appendix to Petition for Writ of Certiorari by depositing the same in the United States Mail, Phoenix, Arizona, with sufficient airmail postage prepaid affixed thereto, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and one copy to:

Philip R. Placier
Thelin, Marrin, Johnson & Bridges
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this 28th day of October, 1981.



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Opposition

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No. 81-692

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSHUA STONECIPHER,
Petitioner

v.

WILLIAM E. BRAY, et al.
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS BECHTEL POWER CORPORATION AND MILES H. BRESEE, JR.

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No. 81-692

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSHUA STONECIPHER,
Petitioner

v.

WILLIAM E. BRAY, et al.
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS BECHTEL POWER CORPORATION AND MILES H. BRESEE, JR.

STATEMENT OF THE CASE*

This is a tax protestor case. Petitioner's complaint sought an injunction prohibiting certain IRS employees from instructing his employer, Bechtel Power Corporation ("Bechtel"), to

* Pursuant to Rule 28.1 of the Rules of this Court, respondents set forth the following "listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates" of respondent Bechtel Power Corporation. The parent of Bechtel Power Corporation is Bechtel Group, Inc. Bechtel Communications Corporation is a subsidiary of Bechtel Power Corporation. Bechtel Petroleum, Inc., Bechtel Civil & Minerals, Inc., Becon Construction Company, Inc., Bechtel Investments, Inc., Bechtel International Corporation, Bechtel Operating Services Corporation and Dual Drilling Company are affiliates of Bechtel Power Corporation.

withhold taxes from his 1979 wages, an injunction prohibiting Bechtel and its assistant controller from complying with these instructions, and recovery of damages. The courts below held that the requested injunction was barred by the Anti-Injunction Act (26 U.S.C. 7421(a)) and that petitioner's complaint stated no cause of action. Accordingly, the district court dismissed the complaint, and the court of appeals affirmed, describing petitioner's appeal as "frivolous" (Pet. App. 14).

The facts are adequately summarized in the Memorandum For the Federal Respondents in Opposition, and need not be repeated at length here. In 1979 petitioner, who was a leader of a group calling itself "Patriots for Inalienable Rights", and some 1,000 fellow tax-protester employees of Bechtel filed claims of exemption from withholding (CR "18", p. 3; Pet. App. 14). Bechtel, unable to verify petitioner's claim, forwarded it to the IRS pursuant to the then applicable Treasury Regulation (Pet. App. 2). After petitioner failed to respond to the IRS's request for further information, the IRS instructed Bechtel to withhold taxes from his wages, which Bechtel did (Pet. App. 3).

Petitioner protests this conduct by the IRS, claiming that his petition raises three "Questions Presented." In fact, however, all three reduce to the same single question: Were the IRS's actions, as petitioner contends (Pet., Questions Presented), "manifestly" or "patently" contrary to federal law? As shown below, and as every court passing on this question has held, they were not.

Section 3402(a) of the Internal Revenue Code of 1954 (26 U.S.C.) requires that every employer who pays wages "deduct and withhold upon such wages a tax . . . ." Section 3402(n) relieves the employer of this obligation if the employee furnishes a "withholding exemption certificate" stating that the employee incurred no income tax liability for the prior year, and anticipates no such liability for the current year. Section 3402(n) further provides that the certificate must be "in such form and containing such other information as the Secretary may prescribe."

The sum and substance of petitioner's claim is that the IRS somehow acted in violation of these statutory provisions and the Due Process Clause when, pursuant to regulation, it reviewed his exemption certificate for validity and, after petitioner had ignored a request for substantiation, instructed Bechtel to withhold taxes. In other words, petitioner would have this Court hold that Congress's unannounced intent in enacting §3402(n) was to prohibit the IRS from ever questioning the accuracy of an employee's claim (or 1000 employees' simultaneous claims) of exemption from withholding.

To state this contention is to refute it. Section 3402 withholding was obviously intended to put an employee's income tax liability on a "pay-as-you-go" basis, *United States v. Roberts*, 425 F. Supp. 1281, 1283 (D. Del. 1977), and to permit the Government to secure needed revenue without having to resort to levy, *United States v. American Friends Service Committee*, 419 U.S. 7, 10 n.6 (1974). While an employee may remove himself from the "pay-as-you-go" system by filing a certificate of exemption, there is nothing in the language or history of §3402 to suggest that the IRS may not request substantiation of certificates, or refuse to grant an exemption where the employee refuses to comply. That the IRS has such authority has never been doubted by any court. *E.g., Campbell v. Amex Coal Co.*, 610 F.2d 701 (10th Cir. 1979); *Rapp v. Peper*, 45 A.F.T.R.2d 80-565 (D. Alaska 1979); *Chandler v. Perini Power Constructors, Inc.*, 520 F. Supp. 1152 (D. N.H. 1981); *Eagle v. Kenai Peninsula Borough*, 489 F.Supp. 138 (D. Alaska 1980). In challenging the then pertinent regulation (Treas. Reg. §31.3402(n)—1, subsequently deleted and replaced), petitioner has not deigned to favor this Court, or the courts below, with an elucidation of any statutory policy which he thinks is subverted by the IRS's request that he substantiate his claim of exemption. Indeed, having no straw to clutch at, petitioner attempts to fabricate one: He quotes Section 3402(n) of the Code so as baldly to omit its requirement that the claim of exemption contain "such other information as the Secretary may prescribe" (Pet. 11).

In sum, petitioner has made no showing that the now superseded regulation in question is "unreasonable and plainly inconsistent with the revenue statutes." *Thor Power Tool Co. v.*

Commissioner, 439 U.S. 522, 533 n.11 (1979). Absent such a showing, the regulation must be upheld. *Id.*; *Bingler v. Johnson*, 394 U.S. 741, 750 (1969).

Even if the IRS somehow acted improperly in instructing Bechtel to withhold taxes from petitioner's wages, the Anti-Injunction Act, 26 U.S.C. §7421(a), prohibits taxpayers from bringing suit "for the purpose of restraining the assessment or collection of any tax." The purpose of the Act is "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." *Enochs v. Williams Packing and Navigation Co., Inc.*, 370 U.S. 1, 7 (1962). Thus petitioner's rhetoric that the IRS acted contrary to law, apart from its untruth, is also beside the point. Petitioner has a full opportunity to challenge any tax liability, and to raise his claims of illegality, in a refund suit, and that is the remedy to which the Anti-Injunction Act relegates him. *United State v. American Friends Service Committee*, 419 U.S. 7, 11 (1974); *Westgate-California Corp. v. United States*, 496 F.2d 839, 841 (9th Cir. 1974).

Finally, petitioner's Due Process claim adds nothing to his position. To begin with, like his other claims it is entirely dependent on his incorrect assertion that the IRS overstepped its authority. In any event, petitioner's claimed grievance does not rise to constitutional levels. The Due Process clause is not a limitation on the taxing power, *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 24 (1916), and does not require that the taxpayer be afforded a hearing before the tax is collected, *Phillips v. Commissioner*, 283 U.S. 589, 595-97 (1931). Hence, petitioner has suffered no constitutional deprivation.

Respondents therefore respectfully request that the petition for a writ of certiorari be denied.

PHILIP R. PLACIER
ARNE D. WAGNER
THELEN, MARRIN, JOHNSON & BRIDGES

By PHILIP R. PLACIER
Philip R. Placier
Attorneys for Respondents Bechtel Power Corporation and Miles H. Bresee, Jr.

December, 1981.

Opposition

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FILED
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No. 81-692

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOSHUA STONECIPHER, PETITIONER

v.

WILLIAM E. BRAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-692

JOSHUA STONECIPHER, PETITIONER

v.

WILLIAM E. BRAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner seeks review of the dismissal of his complaint which sought to enjoin the federal respondents, employees of the Internal Revenue Service, from instructing his employer to withhold taxes from his wages and to recover damages arising from their refusal to accept, without further documentation, the income tax withholding form filed with his employer.[1] The courts below dismissed the action on the grounds that petitioner's claim for injunctive relief was barred by the Anti-Injunction Act (26 U.S.C.

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[1]Petitioner's suit was brought against three employees of the Internal Revenue Service (and their spouses), his employer (Bechtel Power Corporation) and the assistant controller of Bechtel (and the assistant controller's wife).

7421(a)), and that there was no action that warranted the imposition of damages (Pet. App. 1-17).[2]

The pertinent facts may be summarized as follows: In January 1979, petitioner filed with his employer, Bechtel Power Corporation, an Internal Revenue Service form (Form W-4) indicating that he was exempt from having any income taxes withheld from his wages.[3] Because it was unable to verify the correctness of his form, Bechtel forwarded it to the Internal Revenue Service. On February 27, 1979, the Internal Revenue Service wrote to petitioner that he needed to complete an enclosed worksheet so that it could determine whether he was entitled to claim an exemption from withholding. In accordance with the usual practice in such cases as implicitly authorized by Treasury Regulations, the letter also stated that if petitioner did not respond within two weeks, the Internal Revenue Service would advise Bechtel to begin income tax withholding from his wages as if he were a single person claiming no additional exemptions (Pet. App. 2-3). Petitioner failed to respond to this letter. Thereafter, the Internal Revenue Service informed him that his Form W-4 did not comport with requirements of the Internal Revenue Code, and that his employer had been instructed to withhold from his wages as if he were a single person with no exemptions. Pursuant to these instructions, Bechtel withheld taxes from petitioner's wages on that basis (Pet. App. 3).

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[2]The opinion of the court of appeals is reported at 653 F. 2d 398.

[3]While the opinion of the court of appeals refers to Form W-4, it appears that taxpayer filed a Form W-4E. Form W-4E is used in situations where, as here, the employee claims exemption from withholding under Section 3402(n) of the Internal Revenue Code of 1954 (26 U.S.C.). This form contains a statement that the employee incurred no liability for income tax in the preceding year and anticipates that he will incur no liability in the current year. See Treasury Regulations on Procedure and Administration Section 31.3402(f)(5)-1 (26 C.F.R.).

Petitioner thereupon brought this suit in the United States District Court for the District of Arizona, alleging that the Internal Revenue Service had no authority either to review his Form W-4 or to direct Bechtel to withhold from his wages. The district court dismissed the action for lack of subject matter jurisdiction and for failure to state a claim under Fed. R. Civ. P. 12(b)(1) and (6) (Pet. App. 2-4). The court of appeals affirmed (*id.* at 2).

1. The decision below correctly dismissed petitioner's suit. The Anti-Injunction Act (26 U.S.C. 7421(a)) provides that no court shall issue an order restraining the collection of any tax. While the terms of the statute are absolute, this Court has allowed a narrow exception where a taxpayer demonstrates (1) that under no circumstances could the government ultimately prevail on the merits of the claim, and (2) that taxpayer will suffer irreparable injury if the injunction is not issued. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7 (1962). See also *Bob Jones University* v. *Simon*, 416 U.S. 725, 736-737 (1974). Petitioner made no attempt to satisfy these requirements. Instead, he argues (Pet. 19-21) that the Act does not apply here because the federal respondents acted without legal basis in directing Bechtel to disregard his Form W-4 and to withhold tax from his wages. But the Anti-Injunction Act on its face applies and furthermore, as we shall show, the Service's action in this case was fully authorized by the pertinent Treasury Regulations. Accordingly, the courts below correctly concluded that they had no jurisdiction to grant the requested injunction.

2. Petitioner similarly contends (Pet. 14-19) that he had an actionable claim for damages because the Internal Revenue Service's actions were beyond its statutory powers and violated the Due Process Clause of the Fifth Amendment. But the Service acted in accordance with the pertinent statutory and regulatory requirements. Section 3402(a) of

the Internal Revenue Code of 1954 (26 U.S.C.) provides that "every employer making payment of wages shall deduct and withhold upon such wages a tax * * *." Section 3402(n) of the Code releases an employer from the requirement of withholding, if the employee furnishes to the employer a "withholding exemption certificate" certifying that the employee (1) incurred no income tax liability in the preceding taxable year, and (2) anticipates no income tax liability for the current year. Treasury Regulations on Procedure and Administration, Section 31.3402(f)(2)-1(c) (26 C.F.R.), however, provide in pertinent part, that an employer who has received an "invalid certificate" is authorized to withhold as if the employee were a single individual claiming no exemptions. Moreover, under Treasury Regulations on Procedure and Administration, Section 31.3402(n)-1 (26 C.F.R.), an employer is obligated to advise the Internal Revenue Service if it believes that the withholding exemption certificate contains an incorrect statement.[4]

Here, petitioner was one of the approximately 1,000 employees of Bechtel who claimed exemption from withholding and, as the court of appeals observed (Pet. App. 14 n.2): "This barrage of unusual filings justified Bechtel in questioning the veracity of Stonecipher's W-4." Accordingly, pursuant to Section 31.3402(n)-1 of the Regulations,

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[4]This provision in Section 31.3402(n)-1 was deleted, effective April 1, 1980, and replaced first by Treasury Regulations on Procedure and Administration, Section 31.3402(f)(2)-1(g) (T.D. 7682, 45 Fed. Reg. 15526-15527 (1980)) and then by Temporary Treasury Regulations on Procedure and Administration, Section 37.3402-1 (T.D. 7772, 46 Fed. Reg. 17548 (1981)). Both of these Regulations specifically provide, in pertinent part, that the employer shall submit the withholding exemption certificate of an employee claiming exemption from tax and, if the Internal Revenue Service determines that it lacks sufficient information to verify the certificate's correctness, the employer shall, at the direction of the Service, disregard such certificate.

Bechtel properly forwarded petitioner's withholding form to the Internal Revenue Service. The Service advised Bechtel to disregard the form and to withhold tax only after petitioner made no attempt, upon request, to substantiate the information contained on the form. Nor is there a basis for the contention that the Service lacked this authority. As the court of appeals noted (Pet. App. 11), the Service has the right to examine such forms for accuracy and to take the steps necessary to insure compliance with the revenue laws.[5] Accord: *Campbell* v. *Amax Coal Co.*, 610 F. 2d 701 (10th Cir. 1979); *Rapp* v. *Peper*, 45 A.F.T.R. 2d 80-565 (D. Alas. 1979); *T.F. O'Reilly* v. *The Morrill Press*, Nos. 80-CV-990 and 80-CV-991 (N.D.N.Y. June 10, 1981), appeal pending, No. 81-7499 (2d Cir.).

Finally, petitioner has failed to articulate or demonstrate any violation of the Due Process Clause of the Fifth Amendment.[6] Petitioner's due process rights are adequately

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[5]Contrary to petitioner's suggestion (Pet. 10-14), the construction given to Section 31.3402(n)-1 by the court of appeals does not conflict with Section 3402(n) of the Code. The statute specifically provides that in order for the taxpayer to secure an exemption from withholding his withholding exemption certificate must be "in such form and containing such other information as the Secretary may prescribe" (*ibid.*). It is well established that regulations must be upheld "unless unreasonable and plainly inconsistent with the revenue statutes." *Commissioner* v. *South Texas Co.*, 333 U.S. 496, 501 (1948). If, as here, the taxpayer fails to substantiate information contained in the certificate that is believed to be incorrect, a reasonable interpretation of the statute would allow the Commissioner to reject such a certificate.

[6]*Davis* v. *Passman*, 442 U.S. 228 (1979), upon which petitioner relies (Pet. 18-19), is readily distinguishable from the instant case. This Court in *Davis* held that a cause of action and a damages remedy can be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated. But unlike the petitioner in *Davis*, petitioner here has yet to demonstrate any recognizable violation of his rights to due process, and has failed to show that he has, in fact, been damaged.

protected by the availability of a post-tax collection hearing in the form of a properly filed refund suit under Section 7422 of the Code. *Phillips* v. *Commissioner*, 283 U.S. 589, 597 (1931). There is accordingly no constitutional requirement that would entitle petitioner to a formal hearing prior to the determination that his withholding form was incorrect. See, *e.g.*, *Phillips* v. *Commissioner*, *supra*, 283 U.S. at 595-597.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1981

DOJ-1981-11